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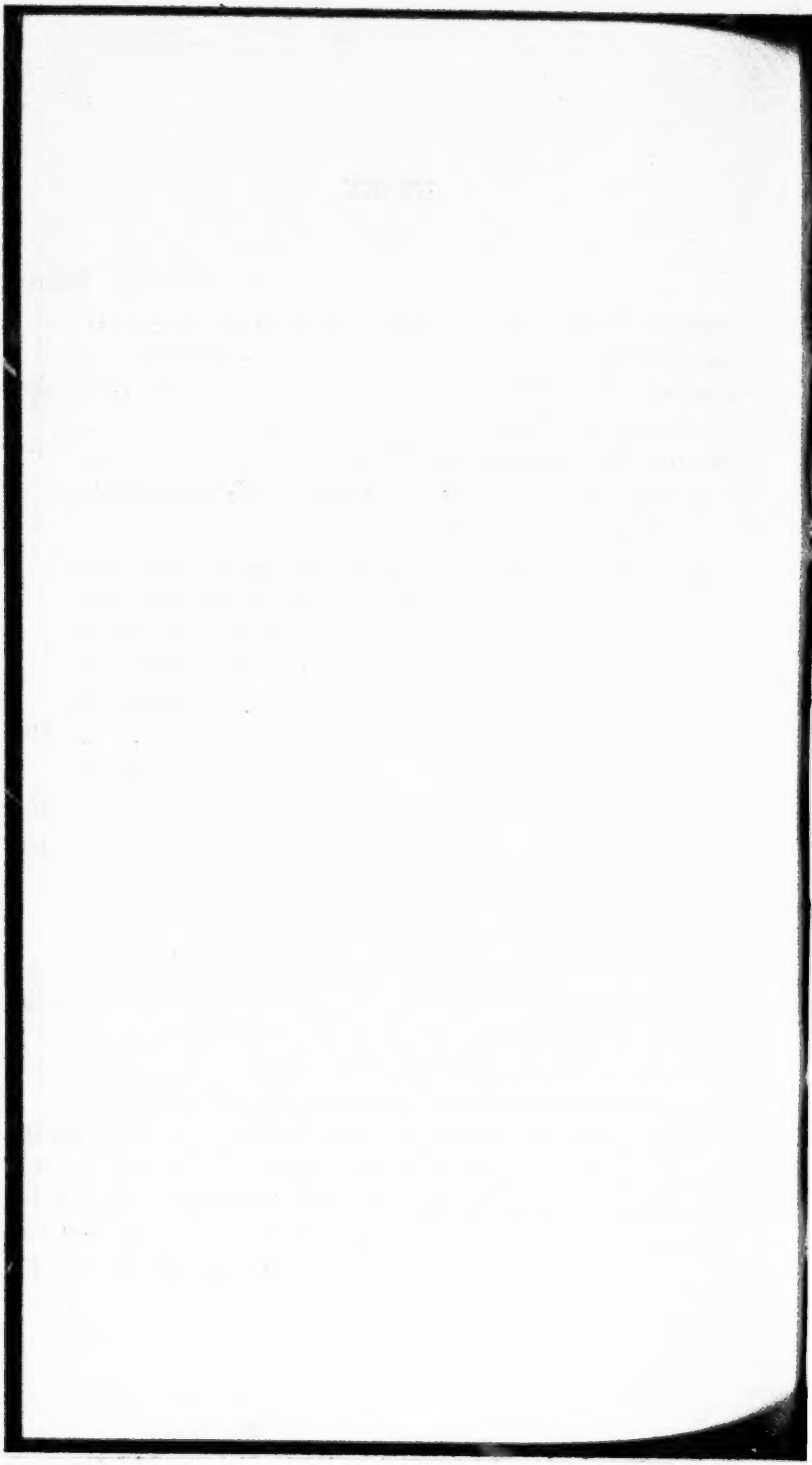

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IN THE

Supreme Court of the United States

OCTOBER TERM A.D. 1969

No. 1579 MISC.

CURTIS ABBOTT,

Petitioner,

VS.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For A Writ Of Certiorari To The Illinois Appellate Court, First District)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Appellate Court affirming the judgment in the instant case is reported at 110 Ill. App. 2d 462; 249 N.E. 2d 675 (1969).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether the true name and address of a witness-informer must be disclosed at trial when such witness-informer is not the principal prosecution witness, his testimony is corroborated, and the real issue presented is not the relative credibility of the petitioner and the witness-informer.

STATEMENT OF FACTS

On July 27, 1966, the petitioner, Curtis Abbott, age 47 (Abst. 39), was convicted by a jury of three counts of sale of heroin (Abst. 91). The Honorable Richard J. Fitzgerald then sentenced the petitioner to not less than fifteen nor more than thirty years in the Illinois State Penitentiary (Abst. 92). Here are the facts of this case.

Inspector Donald Norton, a member of the Illinois Division of Narcotics for six years, had prior to this case obtained about two hundred convictions from his investigations (Abst. 18). He would often use an informer in his work and one of his informers was a man by the name of Harry Schwartz, whom Norton had known for about four or five years (Abst. 18). Schwartz was used by the witness to gain introductions to the sellers and one prior conviction had been obtained, partly as the result of Schwartz's activities (Abst. 19).

On March 11, 1966, about midnight, Inspector Norton met Schwartz in the vicinity of 1100 North LaSalle Street (Abst. 2). After the latter placed a phone call, the two men went to a parking lot at 1160 North Sedgwick, where they met the petitioner about 12:15 a.m. (Abst. 2). Norton was introduced to the petitioner as "Danny" (Abst. 2). Petitioner was told that the men had $50.00 to spend and that

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they wanted a "half" (which means a half spoon of heroin) (Abst. 2). Another phone call was made, after which, all three men went to the vicinity of 64th and Bishop on Chicago's South side (Abst. 3). Upon arrival, Norton handed $50.00 in official advance funds to the petitioner who assured the two men he would not be long (Abst. 3).

Shortly thereafter, the petitioner returned and handed the narcotics to Inspector Norton (Abst. 4). Schwartz never directly participated in the transaction (Abst. 17). The two men then drove the petitioner to his home around 7200 South Union (Abst. 4). Before leaving the car and in response to Inspector Norton's request, the petitioner furnished a telephone number where he could be reached, if additional heroin was needed (Abst. 4). Schwartz drove Norton back to his own car on the North Side of Chicago.

About noon on March 12, 1966, the second phase of the investigation began (Abst. 7). Norton called the petitioner and asked him if he could "cop a half" (Abst. 7). Petitioner said that would be all right and that he would see Norton in about one-half hour (Abst. 7). Arrangements were made for Inspector Hemphill, Norton's co-worker, to enter the investigation (Abst. 8).

Norton, driving by himself, picked up the petitioner about 2:00 p.m. in the same car lot at 1160 North Sedgwick (Abst. 8). The two men then drove to the same general area that they had been in the previous night (Abst. 8). Inspector Hemphill was following them in his own car (Abst. 9). Upon arrival, Norton handed $60.00 to the petitioner who again left the car, walked out of sight, and returned a short time later with additional heroin (Abst. 9). Before the petitioner was dropped off at the corner of 73rd Street and Halsted, he gave Norton a second number, where he could be reached in the event additional narcotics

were needed. Driving away, Norton again noticed Inspector Hemphill right behind them (Abst. 10).

The third and final phase of this investigation began about 8:15 a.m. on March 15, 1966, when the witness phoned the petitioner and again asked if he could purchase some narcotics (Abst. 12). The petitioner's contact, however, was "making up," that is, getting another source of supply together (Abst. 12). Norton was told to call back around noon (Abst. 12). Upon calling back, Norton was told by the petitioner to pick him up at 73rd Street and Halsted, as they would have to go out north this time (Abst. 13). For the second time, Inspector Hemphill would be along under cover (Abst. 13).

After picking the petitioner up, Norton drove back to 1160 North Sedgwick (Abst. 14). Petitioner left the car for a short time, returned, and received the $50.00 from Norton. This time, Inspector Norton counted out the money in an obvious way so that Inspector Hemphill, standing across the street, could see the transaction (Abst. 14). An hour later, the petitioner returned and handed Norton the third package of heroin (Abst. 15). Subsequently, Inspector Norton caused the arrest of the petitioner (Abst. 17).

Norton went on to testify that he had no knowledge of Schwartz having begged the petitioner for drugs prior to Inspector Norton's arrival on the scene (Abst. 19, 22). In fact, Norton was surprised that the petitioner was not surprised to see him with Schwartz on March 11 (Rec. 111). At no time did Schwartz ever directly participate in the first transaction. He was not present for the final two (Abst. 21).

Inspector Paul Hemphill, a college graduate, and narcotics inspector for seven years, was the State's second

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witness (Abst. 23). His testimony was in the main corroborative of Inspector Norton's testimony (Abst. 23-24). He was an active participant in the investigation for only two days, March 12 and March 15 (Abst. 30). On the second phase of the investigation on March 12, he had followed Norton and the petitioner from the north to the south sides of Chicago (Abst. 25). When the petitioner left Norton's automobile, Hemphill attempted to follow him, but he was not successful (Abst. 26). As for the transaction on the 15th, Hemphill took special notice of Norton paying the petitioner for the heroin because Norton had handed the bills to the petitioner in an obvious manner (Abst. 28). Again, however, he was not successful in his attempt to follow the petitioner to his source of supply (Abst. 28). The petitioner was traced to a tavern on the 300 block of West Division however (Abst. 28).

The third witness for the State was Harry Schwartz. When asked if he was known by any other name, the State objected and after a hearing in chambers, the Judge sustained the objection on the ground that the witness was not an actual participant in the crime, and was not the only witness and that the question was not material and would only subject the witness to a possible disclosure of his whereabouts, and for informing and testifying in this case, his life definitely would be in jeopardy (Abst. 32-33). Similarly, the witness was allowed to refrain from giving his current address, because of the fact his life would be in jeopardy in disclosing his address (Abst. 33; Rec. 96). The witness went on to testify that he had been previously convicted of armed robbery (Abst. 31). In addition, he testified that he was currently an addict himself, with a habit costing five or six dollars a day (Abst. 38). The witness had become a police informant initially to keep out

of jail, but there was no case currently pending against him (Abst. 37). He was married, with no children and earned $150.00 a week as a salesman for landscaping supplier (Abst. 35). As to the instant case, he denied ever begging the petitioner to buy drugs for him. Finally, Schwartz testified that he had never handed any money to the petitioner during the first transaction, nor did he receive the heroin back from the petitioner (Abst. 31). His sole function was to introduce Norton to the petitioner (Abst. 31).

REASONS FOR DENYING THE WRIT

Petitioner urges this Court to hold that petitioner was denied his federal constitutional right to confront his accusers when the trial court refused to allow defense counsel to elicit during cross-examination the true name or address of the witness-informer who testified at the trial of petitioner. As authority for such contention petitioner relies upon the case of *Smith* v. *Illinois,* 390 U.S. 129 (1968).

The witness-informer was not the principal prosecution witness and did not participate in the illegal sale. The witness-informer's role in the case was to arrange a meeting between the petitioner and the narcotics agent, Inspector Norton.

In this brief in response to the Petition for a Writ of Certiorari the Respondent will show that the *Smith Case* is not applicable, that public policy requires that the witness-informer's name and address be withheld, and that substantial case law supports the contention of Respondent.

A.

The Instant Case Is Clearly Distinguishable From Smith v. Illinois.

The rule of law established in the *Smith Case* as well as the facts therein are clearly not applicable to the instant case.

The holding in the *Smith Case* was a narrow one. The Court held that the true name and address of a principal prosecution witness, whose crucial testimony is uncorroborated, is a proper subject of cross-examination when the only real issue presented is the relative credibility of the petitioner and the prosecution witness (informer). Thus, in order for a subsequent case to fall within the ambit of the *Smith Case* the following facts must appear: (a) the witness-informer must be the principal prosecution witness, (b) the crucial testimony of the witness-informer must be uncorroborated, and (c) the real issue must be the relative credibility of the petitioner and the witness-informer.

In the instant case the witness-informer, one Harry Schwartz, was not the principal prosecution. The principal prosecution witness was a narcotics agent, Inspector Norton of the Illinois Division of Narcotics. The petitioner was convicted of selling narcotics to Norton (not Schwartz, the informer) on three different occasions. The informer was not even present at the second or third sale. The informer's role in this case was to arrange a meeting between the petitioner and Inspector Norton, and thus was only present at the initial sale.

Inspector Norton testified that at each of the three sales the money was given to the petitioner by Norton and the narcotics were handed to Norton by the petitioner. Thus,

the informer did not directly participate in the illegal sale out of which this prosecution arose. All of the elements of the State's case were established by the testimony of the principal prosecution witness, Norton. Defense counsel was able to fully cross-examine Norton. In accord with the holding in the *Smith Case*, the principal prosecution witness was not immune from full cross-examination.

The second requirement of the *Smith Case* is that the crucial testimony of the witness-informer must be uncorroborated. The testimony of the informer, Schwartz, was not uncorroborated. The testimony given by Schwartz, relative to the illegal sale, was fully corroborated by Inspector Norton. Inspector Norton was in the presence of Schwartz at all times and the actual sale testified to by Schwartz was a sale between the petitioner and Norton. Thus, the second requirement of the *Smith Case* is not present in the instant case because the crucial testimony of the witness-informer was not uncorroborated.

The petitioner contends that the crucial nature of the informer's testimony was not the testimony concerning the illegal sale but the testimony relative to the issue of entrapment, an affirmative defense. (This in itself is a major distinction between the instant case and the *Smith Case.*)

Assuming for argument that the reasoning in the *Smith Case* could be extended to a situation in which testimony of a witness-informer was crucial to an affirmative defense (entrapment), and thus such witness-informer would have to give his true name and address on cross-examination if his testimony were uncorroborated and the real issue presented was the relative credibility of the petitioner and the informer, the facts of the instant case would not require disclosure of the true name and address of the informer. In the instant case the issue of entrapment was

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not a mere issue of credibility between the petitioner and the informer. The real issue was the relative credibility of the petitioner and Inspector Norton. The informer testified as to conversation between himself and the petitioner prior to the arranged meeting between petitioner and Norton. Schwartz testified that he did not induce the petitioner to sell drugs to him by appealing to petitioner's sympathies as a former drug addict. Petitioner offered conflicting testimony (including a rather unbelievable story of how Schwartz induced vomitting to gain petitioner's sympathies). Despite the conflicting testimony of Schwartz and the petitioner, the real crux of the issue of entrapment arose between the petitioner and Norton during the second and third sales. Petitioner testified that he sold Norton the drugs because Norton told petitioner that they were for Schwartz and that Schwartz was too sick to come for the drugs himself. Norton testified that he did not tell the petitioner that the drugs were for Schwartz. Further, petitioner testified that at the first sale he handed the drugs to Schwartz. Norton testified that petitioner gave the drugs to him.

Such conflicting testimony between petitioner and Norton raises an obvious issue of the relative credibility of petitioner and Norton. If the jury believed that petitioner had been truly entrapped they would have believed the petitioner's version that Norton enticed the petitioner by telling petitioner that Schwartz was sick and that the drugs were for Schwartz. The jury chose to believe Norton and not the petitioner. Thus, as to the defense of entrapment (as well as the elements of the illegal sale) the real issue presented was the relative credibility of the petitioner and Norton. Schwartz was not the principal witness of the alleged entrapment. Schwartz, at best, was a material wit-

ness to the alleged entrapment. The State's evidence in opposition to the affirmative defense was not based solely on Schwartz. In fact, as to the defense of entrapment to the second and third sales, Schwartz was not even present so as to be able to offer any testimony. Only the petitioner and Norton knew what actually transpired. The jury chose to believe Norton and not to believe petitioner. The jury chose to believe that the petitioner had not been entrapped. Thus, the third requirement of the *Smith Case,* that the real issue presented be one of the relative credibility of the petitioner and the informer, is not present in the instant case.

Based on the above argument the Respondent submits that the instant case is sufficiently distinguishable from *Smith* v. *Illinois,* not to require that the true name and address of the informer be revealed at trial.

B.

It Is Vital To The Public Interest In Law Enforcement Not To Require At Trial The Disclosure Of The True Name And Address Of A Witness-Informer Who Is Not The Principal Prosecution Witness And Whose Testimony Is Corroborated By A Narcotics Agent.

As a matter of public policy the Respondent asserts that it is vital to the adequate enforcement of the narcotics laws not to require that the true name and address of the witness-informer be revealed when such witness-informer did not actively participate in the illegal sale, but only "set-up" the meeting between the seller and the narcotics agent.

If ever a situation can be envisioned that would open up a so-called "pandora's box," this is the situation. If this

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Court were to extend the holding in the *Smith Case* to require that the true name and address of the witness-informer be revealed, even though such witness-informer is not the principal prosecution witness, but only the one arranging the meeting between the seller and the narcotics agent, the police informer would be a thing of the past. A defendant in a criminal trial, in order to force the exposure of the true name and address of the informer, would need only raise the affirmative defense of entrapment. The defendant would need only take the stand and testify that the informer begged, pleaded, faked being sick, and other such acts that appealed to his sympathies as a former addict; and that no one else was present. This would be sufficient to present an issue of the relative credibility of the defendant and the informer as to the affirmative defense of entrapment and require the disclosure of the informer's true identity (if the Court were to hold as petitioner urges).

If the Court were to extend the holding of *Smith Case* as the petitioner urges the name and address of the informer would have to be revealed in every case in which an informer was involved.. If an informer was certain of such exposure, he would no longer be able to aid the police for fear of his own personal safety and that of his family. If the law were to be extended as the petitioner urges, a needless and tragic blow would be struck to the enforcement of the narcotics laws of the federal and state governments. It would destroy the balance between the public interest in protecting the flow of information against the individuals right to prepare his defense. The informer's privilege would be non-existent and society would lose a vital aspect of its defensive arsenal against the narcotics traffic.

In *McCray* v. *Illinois*,[1] the Court, while discussing the importance of the police informer, quoted Professor Wigmore and said:

> "A genuine privilege, on . . . fundamental praecept . . ., must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this sort ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reaction, and to avoid the risk of defamation or malicious prosecution against him. The government also has an interest in non-disclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual rule role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship." 385 U.S. at 308.

The Respondent contends that the logic of the case presented does not require that the informer's true name and address be revealed. In every case that can be imagined in which the informer does not participate in the sale itself, an alleged entrapment must necessarily involve a third party. This third party would be the one who ac-

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1. 385 U.S. 300 (1967). The Court in *McCray* held that the identity of an informer need not be disclosed at a preliminary hearing to determine probable cause for arrest if the court is convinced by evidence and testimony presented at the hearing that the officer relied in good faith upon credible information supplied by a reliable informant.

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tually makes the purchase. He would be able to testify to facts relevant to the issue of entrapment. When the third party testifies to the facts surrounding the illegal sale he may be fully examined as to the issue of entrapment. As the facts of the instant case illustrate, the third party, Inspector Norton, testified that at no time did he hear or know of any facts that indicated that Schwartz used an appeal to the petitioner's sympathies as a former addict in order to arrange the initial meeting and sale. Further, the third party, Inspector Norton, testified that at the second and third sale he did not tell the petitioner that the drugs were for Schwartz or that Schwartz was too sick to get them for himself. Thus, in such a situation the issue of entrapment is presented to the jury as more than a mere issue of the relative credibility of the defendant and the informer. It becomes an issue of the relative credibility between the defendant and the third party and the informer. If the jury believes the third party (Inspector Norton in the instant case) and finds that at the initial sale itself and at the subsequent sales that the third party did not rely upon any appeal to sympathies to induce the sale, then, it necessarily finds that the defendant was not telling the truth as to the alleged entrapment. If the jury finds that the defendant is not telling the truth relative to the issue of entrapment at the actual sales, it may justifiably chose not to believe the defendant's testimony as to the circumstances leading up to the initial meeting and sale to the third party. In such a situation the Respondent respectfully submits that the testimony of the informer is sufficiently corroborated so as to present the issue to the jury without the necessity of revealing the true name and address of the informer.

In the instant case the judge and the jury were well apprized of the background and character of the witness-in

former so as to make a valid evaluation of his testimony and credibility. While the role of the informer was patently minor, all sales in question having been made to Inspector Norton, the informer's background, with the exception of his true name and address, were known to the petition and to the jury. For example, the informer was an admitted narcotics addict since 1951, with a habit costing $6.00 per day (Abst. 38). Also, he had been convicted of armed robbery in the past, the crime having been committed to get money for drugs (Abst. 31, 38). While he had become an informer to receive consideration from the authorities for a case pending against him, there was no case currently pending, and the informer received only money for his efforts (Abst. 37-38). Not all of this informer's background was unsavory however, for he also testified that he was a salesman for a landscaping supplier, working on commission for about $150.00 per week (Abst. 34-35). In addition he was married, but had no children (Abst. 35). Naturally, complete inquiry was made on the issue of entrapment and no claim is presented in petitioner's brief that any restriction on cross-examination occurred as to the details of the claimed entrapment (Abst. 38).

In short, the most compelling reason why *Smith* does not govern this case is that the necessity to apply its rationale is not present here. In *Smith,* disclosure of the name and address was necessary to enable the defendant to explore the question of the informer's credibility. In this case the jury knew that the witness had been in the penitentiary, was a narcotics addict and had become an informer in return for consideration in a previous case. In these circumstances, to require disclosure to permit an inquiry into credibility would have been an empty ges-

ture. Especially is this true when the claim is balanced against the competing policy considerations underlying non-disclosure.

The Respondent urges, based on the above argument, that public policy and the logic of the situation require that the informer's true name and address not be disclosed.

C.

Substantial Case Law Supports The Contention of Respondent.

The case of *Pointer* v. *Texas,* 380 U.S. 400 (1965), held that the Sixth Amendment right to confront witnesses, which has been held to include the right to cross-examine,[2] was applicable to the States by the Fourteenth Amendment. The question remaining unanswered is how far and to what extent this right may be exercised.

The question as to how far and to what extent the right of cross-examination may be exercised was discussed by the Court in *Alford* v. *United States,* 382 U.S. 687 (1931). The Court in the *Alford Case* said: "The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted . . . . But no obligation is imposed on the Court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds

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2. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963).

of proper cross-examination merely to harass, annoy or humiliate him."[3] 382 U.S. at 694.

In *Smith* v. *Illinois,* Justice White in his concurring opinion, with whom Justice Marshall joined, stated, "In *Alford* v. *United States,* 282 U.S. 687, 694 (1931), the Court recognized that questions which tend merely to harass, annoy, or humiliate a witness may go beyond the bounds of proper cross-examination. I would place in the same category those inquiries which tend to endanger the personal safety of the witness."[4] 390 U.S. at 133.

In the instant case our concern is the scope of cross-examination relative to disclosure of the true name and address of a witness-informer.

Perhaps the best statement of the law as to when and under what circumstances a witness-informer's true name and address must be revealed was laid down in the case of *Roviaro* v. *United States,* 353 U.S. 53 (1957)[5] The Court in *Roviaro* said, "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to pre-

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3. Quoted with approval by the majority in *Smith* v. *Illinois,* 390 U.S. 129 (1968).

4. Justices White and Marshall found that the State had failed to come forward and show why the witness should not have to answer the question relating to the informer's true name and address.

5. In *Roviaro,* the informer, John Doe, did not take the stand and the informer was the sole participant in the transaction charged, thus, the *identity* of the informer was not known to the defense. On these facts, the Court held that it was reversible error not to disclose the informer's true name and address.

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pare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relative factors." 353 U.S. at 62.

Such a rule of law as laid down in *Roviaro* calls for the Court in each case to balance the public interest of protecting the flow of information and the defendant's right to prepare his defense. This means that as each case is decided the Court must decide whether the facts presented require the disclosure of the true name and address of the witness informer. In some situations it is clear that disclosure is required while in others disclosure is clearly not necessary. In the *Smith Case,* the Court held that when the witness-informer is the principal prosecution witness and his testimony is uncorroborated, the real issue becoming the relative credibility of the informer and the defendant, that the true name and address of the informer must be revealed. However, when a set of facts is presented that does not fit into the facts of the *Smith Case,* disclosure will not necessarily be required. *People* v. *Morales,* 69 Cal. Rptr. 402 (1968); *cert. den.* 393 U.S. 1104 (1969), is such a case. In the *Morales Case,* an informer, "Chico," arranged a meeting between the defendant and under cover narcotics agents. In affirming the refusal of the trial court to require that "Chico" reveal his true name and address, the California Court of Appeals said:

"In *Smith,* . . . the Supreme Court held that the denial of a right to cross-examine an informer-witness respecting his true name and place of residence constituted a denial of due process where the informer who made the purchase of a narcotic was the only witness for the prosecution and

the case turned on his credibility as against that of the defendant. In the present case, "Chico's" testimony was substantially the same as, and merely corroborated, the testimony previously given by officers Reyes and Tryal."

To summarize the law as presented above, the Respondent submits that the extent of cross-examination is a matter of discretion with the judge and such cross-examination should be limited so as not to harass, annoy, or humiliate the witness.[6] Inquiry on cross-examination as to a witness-informer's true name and address should be further limited so as not to place the informer in physical danger.[7] In order to determine whether the true name and address of the informer should be disclosed, no fixed rule should be followed; but the Court should balance the interest of the state in keeping its flow of information against the defendant's right to prepare his defense.[8] If the informer is the principal prosecution witness and his testimony is uncorroborated, the informer's true name and address must be disclosed at trial.[9] And, if the informer is not the sole prosecution witness and his testimony is corroborated, his true name and address need not be disclosed at trial.[10]

At the trial of the instant case when counsel for defense asked the witness-informer his name and address, the State's objection was sustained (Abst. 32). The Court gave

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6. *Alford* v. *United States,* supra.

7. *Smith* v. *Illinois,* supra. Concurring opinion of Justices White and Marshall.

8. *Roviaro* v. *United States,* supra.

9. *Smith* v. *Illinois,* supra.

10. *People* v. *Morales,* 69 Cal. Rptr. 402 (Court of Appeals, 1968) *cert. den.* 393 U.S. 1104 (1969).

the following reason for sustaining the objection: "I think that the question of his address is not material and would only subject the witness to a possible disclosure as to his whereabouts, and for informing and testifying in this case, his life would be in jeopardy and it is because of the fact his life would be in jeopardy in disclosing his address, the Court would refuse to permit the information to be divulged at this time." (Abst. 33).

Respondent submits that the trial court correctly interpretted the law and properly exercised its discretion by sustaining the objection to defense counsel's inquiry based on a valid belief that such inquiry would likely place the informer in physical danger. Further, Respondent contends that the facts of the instant case are substantially similar to *Morales* and substantially dissimilar to *Smith* (see Part A of this Brief) to warrant a holding that the trial court did not err in denying disclosure of the informer's true name and address during the trial.

CONCLUSION

The People of the State of Illinois request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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